UMW INDUSTRIES [1985] SDN. BHD.

v.

KAMARUDDIN ABDULLAH & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
SITI NORMA YAAKOB J
[CIVIL SUIT NO. C24-2654-86]
11 JULY 1989

CIVIL PROCEDURE: *Setting aside default judgment - 2nd defendant's application to set aside judgment in default of appearance - Grounds of defendant's application are (1) writ and statements of claim was not served on him (2) as a guarantor, there was no proper demand to him and (3) he signed blank copies of the two guarantees on which he is sued - Plea of non est factum - Whether any merits shown in application.*

In this case, judgment in default of appearance was entered against the 2nd defendant on 4 December 1986. The 2nd defendant applied to set aside the said judgment and he raised the following issues; (1) that he has not been served with the writ and the statement of claim (2) as a guarantor, there was no proper demand made to him and (3) that he only singed blank copies of the two guarantees on which he is now being sued.

Held:

[1] The 2nd defendant cannot now claim that he has not been served with the writ and statement of claim as it is very clear from the affidavit of service and by his conduct that he was personally served with the writ and the statement of claim on 23 July 1986 and he admitted that he was the person named as the 2nd defendant in the suit but he however refused to acknowledge receipt of the writ and statement of claim.

[2] The 2nd defendant's objection that he had not been served with a notice of demand merits no consideration whatsoever as the guarantee does not contain a demand clause.

[3] As for the 2nd defendant's contention that he only signed blank guarantee forms, he has only himself to blame as the plea of *non est factum* does not work in favour of a person who has shown himself to be negligent.

[4] The 2nd defendant's application to have the judgment in default against him set aside was dismissed with costs as all the issues raised have been dealt with satisfactorily by the affidavit evidence and the 2nd defendant has not shown any merits on his application.

[Application to set aside judgment in default dismissed with costs.]

For the 2nd defendant/applicant - L. Parthiban; M/s. L. Parthiban & Associates
For the plaintiff/appellant - Thurairaj; M/s. K.L. Rekhraj

JUDGMENT

Siti Norma Yaakob J:

Judgment in default of appearance was entered against the 2nd defendant in this suit on 4 December 1986 and on an application to have that judgment set aside, he raised the following issues.

1. That he has not been served with the writ and statement of claim.
2. As a guarantor, there was no proper demand made to him.
3. That he only signed blank copies of the two guarantees on which he is not being sued.

From the affidavit of service, it is very clear that the 2nd defendant was personally served with the writ and statement of claim on 23 July 1986. At the time of service the 2nd defendant admitted that he was the person named as the 2nd defendant in the suit but he however refused to acknowledge receipt of the writ and statement of claim and by his very conduct I consider that he cannot now claim that he has not been served with the writ and statement of claim.

The 2nd defendant is sued on 2 guarantees, the first dated 15 May 1984, the second dated 15 June 1984 but for completeness, the presence of a third guarantee executed by him dated 15 September 1984 is also mentioned in the pleadings. There is a limit of RM20,000 expressed in the first guarantee and it is in respect of spare parts and accessories which had been delivered by the plaintiff to Pemborong Kejuruteraan Awam Larkin, a joint venture firm (the firm) set up by the 1st and 2nd defendants. The spare parts and accessories relate to 2 units of bulldozers which had been delivered to the firm and which were purchased by the firm on terms and conditions as set out in 2 hire purchase agreements dated 15 June 1984 and 15 September 1984.

The 2 units were ordered by the firm pursuant to a sales order dated 12 March 1984 and delivered to the firm on 16 March 1984 and the delivery was acknowledged by the 2nd defendant himself. However, prior to the execution of the first hire purchase agreement on 15 June 1984, the 1st defendant, a manager of the firm and by letter dated 23 May 1984 returned one of the 2 units delivered bearing chassis number 28372 and authorised the plaintiff to transfer the down payments of the returned unit for the purchase of another new unit, model D60E-LK (the substituted unit).

On 23 May 1984, the 1st defendant executed a sale order in respect of the substituted unit and the hire purchase agreement in respect of the substituted unit was executed on 15 June 1984. Payment on this unit is guaranteed by the 2nd defendant, pursuant to a letter of guarantee and indemnity dated 15 June 1984. It is in respect of this guarantee and the earlier guarantee dated 15 May 1984 guaranteeing the payment of the spare parts and accessories that the 2nd defendant is now being sued.

Although the hire purchase agreement relating to the purchase of the substituted unit was executed by the firm with UMW Acceptance & Credit Sdn. Bhd. (UMW Acceptance), it is not disputed that on 5 October 1985, UMW Acceptance assigned all their rights and liabilities under the hire-purchase agreement to the plaintiff. It is also not disputed that the firm defaulted in the payment of all instalments due and other charges incurred under the hire purchase agreement executed on 15 June 1984, for the substituted unit, which loss has been calculated at RM51,825.90 and there was also default in payment of the spare parts and accessories amounting to RM16,201.35.

Under the letter of guarantee and indemnity dated 15 June 1984, the 2nd defendant guaranteed the payment of all hire-purchase instalments and other payments payable under the hire-purchase agreement dated 15 June 1984 and that his liability shall be computed upon the footing that the hire-purchase agreement is fully binding and enforceable against the firm, the hirer. Alternatively, the 2nd defendant has also agreed "to indemnify the plaintiff for all loss or damage suffered and all claims, costs and expenses made against or incurred by the plaintiff in any way arising out of or consequent upon your having entered into such hire-purchase agreement whether arising out of a breach by the hirer (i.e. the firm) of any of the terms and conditions thereof or otherwise including any such loss or damage etcetera, as aforesaid, as may arise from the said hire-purchase agreement being (for whatever reason) unenforceable against the hirer".

Reading the 2nd defendant's liability under the guarantee, it is very clear that he had undertaken a very onerous liability as he had agreed to indemnify the plaintiff against all loss, even though, through no fault of the firm.

The guarantee does not contain a demand clause and as such, the 2nd defendant's objection that he had not been served with a notice of demand merits no consideration whatever.

However, as regards the earlier guarantee dated 15 May 1984 for the spare parts and accessories, there is a demand clause in cl. 1 as well as a principal debtor clause included in cl. 10 and I consider that the presence of this principal debtor clause alone obviates the necessity of sending a notice of demand prior to the filing of this suit, as the service of the writ in itself is a demand.

As for the 2nd defendant's intention that he only signed blank guarantee forms, he has only himself to blame as the plea of *non est factum* does not work in favour of a person who has shown himself to be negligent.

As all the issues raised have been dealt with satisfactorily by affidavit evidence and the 2nd defendant has not shown any merits on his application, I had accordingly dismissed his application, to have the judgment in default entered against him, set aside, with costs.

Also found at [1989] 2 CLJ 1278